No. 6482

In the

United States Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY
a Corporation
Appellant
vs.
W. G. SHELLENBARGER
Appellee

Upon Appeal From the United States District Court for the District of Oregon

Petition for Rehearing

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Petition for Rehearing

Now comes appellant and petitions this honorable court for a rehearing of this cause, upon the following grounds:

The decision of this court, filed December 14, 1931, is clearly erroneous, because based upon an incorrect statement of the evidence. The decision holds that the evidence, if construed most favorably to appellee, required submission of the case to the jury. In stating the evidence, thus construed, this

court misread the record in the following essential particulars:

1. The court mistakenly assumed that there was evidence to show that the train from which appellee fell, or was thrown, was being operated over a track *then under construction,* and that the speed of the train was fifty miles an hour.

2. The court mistakenly assumed that there was evidence in the record to show that the trap covering the car steps was lifted at the time of the accident.

3. The court mistakenly assumed that the testimony of appellee that he did not see the brakeman in the vestibule doorway was equivalent to testimony that the brakeman was not there.

I.

The record in this case has no evidence of any kind which even suggests that the track upon which appellant's train was running at the time of the accident was *under construction.* Apparently the court misread the testimony of the witness Hanley, who explained that a new second track, parallel to the main track in use, was being constructed at the time. (Record, pp. 202-204, 206-207, 209.) The slow order affecting the speed of passing trains was not attributable to any under-normal condition of the track upon which the trains ran, but to the fact that on the right of way adjacent to the main track an-

other track was under construction. The main track upon which the trains ran was not shown to have been affected in any way.

Since the order for reduced speed obviously was for the protection of men at work during working hours (appellee's accident occurred during the night-time) faster speed over a track in good condition would not be a violation of any duty owing to a passenger. But assuming the question of speed to be material, nowhere in the record is there anything whatsoever to justify the statement of the opinion that "the appeal must be determined upon the theory that the train was going fifty miles an hour."

It is difficult to find any basis for this statement, unless the court has confused assertions of counsel with evidence upon this point. No witness testified to any such speed, and there is *absolutely nothing* in the evidence from which a jury could be permitted to deduce an inference that the train in question was running at a speed of fifty miles an hour at the time of the accident.

Appellee called no witnesses to testify as to the speed of the train. Two of appellant's witnesses, the engineer and the fireman of the train, were questioned upon this point. One estimated the speed at twenty to twenty-five miles an hour (Record pp. 223-224, 227), and the other at eighteen to twenty miles an hour. (Record pp. 250-251). The train went about a half mile before it came to a stop

and appellee's counsel sought to have these witnesses admit that this evidenced faster speed. Both declined to do so, explaining that while a train going twenty miles an hour could be stopped in a shorter distance, and while it would take a half mile or more to stop a train going fifty miles an hour, the distance required in any given case must necessarily depend upon the extent to which the air brakes were applied. Here no emergency stop was attempted; the train came to a gradual stop. (Record pp. 231-233, 235, 251-255). This testimony was undisputed. It was entirely credible and the jury could not capriciously disregard it. *C. & O. Ry. Co. v. Martin,* 283 U. S. 209. Obviously the distance traveled in making a stop gives no indication of the speed unless an attempt is made to bring the train to a stop in the shortest possible distance. See *Southern Ry. Co. v. Walters,* 52 Sup. Ct. Reporter 58 (decided Nov. 23, 1931), in which attempts to determine from the speed of a train, whether it had shortly theretofore made a stop, were condemned as guesses.

II.

There is no testimony in the record upon which the jury could find that the vestibule trap had been lifted and was open at the time of the accident. Two witnesses testified that this condition obtained when they arrived at the car platform *after the accident.* (Record pp. 80, 147). The trial court overruled an

objection to this testimony, evidently expecting that it would be supplemented by other evidence which would make it pertinent. (Record p. 147). No such testimony was presented. On the contrary it appeared that immediately after the accident, and before these two witnesses reached the car platform, a general alarm had been given, the train was slowing down, and train employes and passengers were preparing to alight to seek for and to help the injured man. (Record pp. 66-68, 283).

III.

The court is clearly in error in stating that "the testimony of the appellee that he did not see the brakeman is equivalent to a statement that the brakeman was not guarding the open trap door or the vestibule door."

Negative testimony is never the equivalent of positive testimony unless it appears (1) that the witness is in a position to see or hear, and (2) that the witness' attention was attracted to the occurrence. This foundation is necessary before testimony of failure to notice a condition can be said to conflict with direct proof of the existence of the condition; without it, the testimony is insubstantial and does not make an issue of fact for the jury. *Southern Ry. Co. v. Walters,* 52 Sup. Court Reporter 58; *Gulf, Mobile & Northern Rd. Co. v. Wells,* 275 U. S. 455; *Bergman v. Nor. Pac. Ry.*

Co., 14 Fed. (2nd) 580; *Pere Marquette Ry. Co. v. Anderson,* 29 Fed. (2nd) 479.

The testimony of appellee to which the court referred was negative in character and it was lacking entirely in the foundation necessary to make it contradictory of the testimony of the brakeman. The condition of the record in this respect is as follows:

(1) At the time of the occurrence appellee was passing through the vestibule between the doorway of the car and the opening into the vestibule of the next car. He was walking *forward.* (Record p. 98). The brakeman testified that he (the brakeman) was standing at the extreme left side of the vestibule, leaning out of the vestibule doorway and looking toward the engine. (Record pp. 281-282). It would seem beyond question that a passenger while taking a step or two across a car platform, in walking from one car to another in the nighttime, and necessarily looking forward, might or might not observe a trainman two or three feet to his left, whose body was partly within and without the opening at the extreme left side of the vestibule platform. The statement of such a passenger that he did not notice anyone in the vestibule means exactly what it says. One person, in the existing circumstances might have seen the trainman, another might not; appellee did not happen to notice whether there was anyone there. His situation was not such that his

failure to observe the brakeman denies the presence of the brakeman in the vestibule.

(2) Appellee's attention was not attracted in any way to the facts pertaining to the condition of the vestibule or to the presence or absence of a brakeman in the left doorway of the vestibule. It was nighttime but appellee did not even notice whether or not any lights were burning in the vestibule. (Record p. 115). He did not notice whether the vestibule door was open, although the current of air could hardly have escaped observation had he been giving any attention to the left side of the vestibule. He did not see or hear anybody in the vestibule; he observed only "just the ordinary passage between the cars." (Record pp. 98-99).

The very form of appellee's statement demonstrates that it lacks both of the particulars required to make it contradictory of the brakeman's testimony. He was walking forward not in a position where he would necessarily become aware of occurrences at the left of the narrow vestibule, as he took the step or two necessary to cross from the car door to the entry to the next car, and he did not profess to have had his attention directed to, or to have noticed anything about, the left side of the vestibule. His statement is therefore not in conflict with the testimony of the brakeman.

These misconceptions of the record go to the heart of appellee's case. The verdict against appellant, to be sustained, must be supported by some believable explanation of the accident. The original theory was that the train swerved suddenly because of excessive speed when turning into a siding, and that this threw the appellee sideways with sufficient force to catapult him through the left vestibule opening. This theory was abandoned at the opening of the trial.

This court has undertaken to account for appellee's strange accident upon the assumption that fast running over a track under construction caused a swaying motion great enough to destroy appellee's balance, and to lift him from his feet and throw him sideways through the narrow opening and clear of the train. This theory likewise must be abandoned.

The case as submitted to the jury was predicated upon appellee's statement that a jerk of the train caused him to lunge *forward*. No lateral movement was suggested; indeed the idea of a swaying motion was negatived. (Record p. 100). There was no claim of a sudden enforced sideways movement or of any stumbling sideways down open steps and through the vestibule doorway. Appellee knew that a jerk caused him to lunge forward when he was walking lengthwise of the train. His only explanation of what happened next is that at once he was

lifted from his feet and carried *at right angles* from his course through the narrow opening without touching handholds, brakelevers or anything else.

The train did not swerve into a sidetrack at excessive speed; there was no lateral motion due to high speed on a track under construction. Nothing occurred which could possibly have caused a passenger to leave the train in the manner described by appellee. His story is beyond belief.

This court does not try the facts. It has the duty, nevertheless, of determining whether the record, correctly read and understood, has any substantial evidence to support the jury's verdict. The Supreme Court not infrequently has had occasion to say that evidence which has no substantial weight, even though it may constitute *some* evidence on the subject, is inadequate to take a case to the jury. *Gulf, Mobile & Northern Rd. Co. v. Wells,* 275 U. S. 455; *A. T. & S. F. Ry. Co. v. Toops, Admr.,* 281 U. S. 351.

In the case at bar, appellee's inability to connect his "lunge forward" with his fall through the side vestibule doorway, his unwillingness to say definitely that the brakeman was not where he claimed to have been, and, finally, appellee's entire lack of knowledge of the conditions in the vestibule, extending even to the question of light and darkness, combine to make his testimony altogether too insubstantial to raise any conflict with the direct and

positive statement of the brakeman. The jury should not have been permitted to conjecture, upon this record, that the brakeman may not have been present in the vestibule doorway, or that there may have been some swaying or lateral movement great enough to throw appellee from the train.

We respectfully submit that the misunderstanding of the record evidenced by the opinion of this court makes a rehearing necessary. Appellee's judgment lacks the supporting evidence necessary to its validity. Appellant is entitled to have the facts reexamined and the case reheard.

CHARLES A. HART,
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Counsel for Appellant.

I, CHARLES A. HART, counsel for appellant herein, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that said petition is not interposed for delay.

CHARLES A. HART,
Counsel for Appellant.